IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 20TH DECEMBER 2006 / 29TH AGRAHAYANA 1928

WP(C).No. 33826 of 2006(B)

OS.72/2000 of SUB COURT, SULTHAN BATHERY

.....

PETITIONER:

K. ALI,
S/O. KUNHIMOOSA HAJI,
NOOLPUZHA AMSOM AND DESOM,
SULTHEN BATHERY

BY ADV. SRI.T.P.PANKAJAKSHAN

RESPONDENT:

M.J. CHERIAN,
S/O. JOSEPH,
CHERANGODE AMSOM AND DESOM,
GUDDALUR TALUK

BY

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 20/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

W.P.(C)NO.33826 OF 2006

DATED THIS THE 20th DAY OF DECEMBER, 2006

JUDGMENT

Petitioner is challenging the dismissal of his application filed under Order IX Rule 9 of Code of Civil Procedure to restore the suit, which was dismissed for default. Learned Sub Judge though allowed the petition on payment of cost, for the reason that cost was not paid, dismissed the application. The order of dismissal is challenged in this petition filed under Article 227 of Constitution of India.

2. Under Rule 1(c) of Order XLIII of Code of Civil Procedure, petitioner has a substantive right of appeal to challenge the dismissal of an application filed under Rule 9 Order IX of C.P.C. When petitioner has substantive right of appeal, he is not entitled to file a petition under Article 227 of Constitution of India to set aside that order.

Petition is dismissed with liberty to petitioner to challenge the order in an appeal.

M.SASIDHARAN NAMBIAR,JUDGE

Acd